FILED
OCT 31 19
HAROLD B. WILLEY,

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES,
Petitioner,

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S OPENING BRIEF

David C. Marcus,
215 W. 5th St.,
Los Angeles 13, Calif.;
Fred Okrand,
257 So. Spring St.,
Los Angeles 12, Calif.,
Attorneys for Petitioner.

Ralph Estrada,
133 W. Congress St.,
Tucson, Ariz.;
A. L. Wirin,
257 S. Spring St.,
Los Angeles, Calif.
Of Counsel.

INDEX

Subject Index

	Page
Petitioner's opening brief	1
Opinions below	1
Grounds on which the jurisdiction of this Court is invoked	1
Constitutional and statutory provisions involved	2
Questions presented for review	3
Statement of the case	3
Argument	5
Summary of argument	5
I. Section 401(j) of the Nationality Act of 1940 (8 U.S.C. 801(j)) is unconstitutional	6
A. Preliminary statement	6
B. The right of expatriation is not to be equated with the penalty of expatriation	8
C. Congress has here exceeded its power	12
II. Section 401(j) of the Nationality Act of 1940 as amended, should not be construed to impose expatriation under the facts of this case	19
III. The Government did not produce evidence meeting the standard of proof required	26
Conclusion	31

Table of Cases Cited

Acheson v. *Murakami*, 176 F. (2d) 953	10
Aetna Ins. Co. v. *Kennedy*, 301 U.S. 389	12
Ainslee v. *Martin*, 9 Mass. 454	11
American Communications Association v. *Douds*, 339 U.S. 382	18

Page

Amos v. *United States*, 255 U.S. 313 12
Augello v. *Dulles*, 220 F.(2d) 344 26
Baumgartner v. *United States*, 332 U.S. 665 ..... 26, 27
Chae Chan Ping v. *United States*, 130 U.S. 581 24
Dawson's Lessee v. *Godfrey*, 4 Cranch 321 18
Dos Reis v. *Nicolls*, 161 F.(2d) 860 ..... 6, 8, 26
Federal Communications Commission v. *American Broadcasting Co.*, 347 U.S. 284 19
Fong Yue Ting v. *United States*, 149 U.S. 698 18
Fukumoto v. *Dulles*, 216 F.(2d) 553 26
Galvan v. *Press*, 347 U.S. 522 18
Gibbs v. *Burke*, 337 U.S. 773 11
Glasser v. *United States*, 315 U.S. 60 11
Gonzales v. *Landon*, 215 F.(2d) 955 .....
Guessefeldt v. *McGrath*, 342 U.S. 308 19
Grant, In re, 289 F. 814 10
Hodges v. *Easton*, 106 U.S. 408 12
Igarashi v. *Dulles*, No. 1240 (USDC-Hawaii) 13
Johnson v. *United States*, 333 U.S. 10 12
Johnson v. *Zerbst*, 304 U.S. 459 11
Kawakita v. *United States*, 343 U.S. 717 ..... 10, 14
Kikkawa v. *Dulles*, No. 1256 (USDC-Hawaii) 13
Lapides v. *Clark*, 176 F.(2d) 619, 338 U.S. 860, 888 7
Lehmann v. *Acheson*, 205 F.(2d) 596 26
Lem Moon Sing v. *United States*, 158 U.S. 538 24
Mackenzie v. *Hare*, 239 U.S. 299 ..... 8, 14
Mandoli v. *Acheson*, 344 U.S. 133 26
Martinez v. *McGrath*, 108 F. Supp. 155 28
McGrath v. *Abo*, 186 F.(2d) 766 31
Meyer v. *United States*, 141 F.(2d) 827 30
Moser v. *United States*, 341 U.S. 41 11
Murata v. *Acheson*, 99 F. Supp. 591, 111 F. Supp. 306 ..... 11, 13
Murray v. *Schooner Charming Betsy*, 2 Cranch 64 9
Nieto v. *McGrath*, 108 F. Supp. 150 28
Okimura v. *Acheson*, 99 F. Supp. 587, 111 F. Supp. 303 ..... 12, 13
Patton v. *United States*, 281 U.S. 276 12
Perkins v. *Elg*, 307 U.S. 325 ..... 12, 14, 26
Ponce v. *McGrath*, 91 F. Supp. 23 28

Page

Quinn v. *United States*, 349 U.S. 155 12
Rice v. *Olsen*, 324 U.S. 786 12
Schioler v. *Secretary of State*, 175 F.(2d) 402 26
Schneiderman v. *United States*, 320 U.S. 118 ..... 19, 26
Shanks v. *Dupont*, 3 Pet. 242 8
Smith v. *United States*, 337 U.S. 137 12
Terada v. *Dulles*, 121 F. Supp. 6 13
Uesu v. *Dulles*, No. 1251 (USDC-Hawaii) 13
Ureges v. *Pa.*, 335 U.S. 437 11
United States v. *Di Ro*, 332 U.S. 581 12
United States v. *Kuwabara*, 56 F.Supp. 716 10
United States v. *Wong Kim Ark*, 169 U.S. 649 ..... 8, 14

STATUTES AND AUTHORITIES CITED

Agreement of June 22, 1943 between the United States and Mexico Respecting Military Service (57 Stat. 973-977) 23
Blackstone Commentaries, Volume 1, p. 367, et seq. .. 10

Constitution of the United States:

Article I:

Sec. 1 16
Sec. 2, sub. 1 16
Sec. 2, sub. 4 16
Sec. 3, sub. 6 16
Sec. 3, sub. 7 16
Sec. 6, sub. 1 17
Sec. 8, cl. 4 7

Article II:

Sec. 1, sub. 1 17
Sec. 2, cl. 1 17

Article III:

Sec. 1 17
Sec. 3 7
Sec. 3, cl. 3 17

Article IV:

Page

Sec. 3, cl. 2 .....

Article VI:

Sec. 2 7
Sec. 3 17

Third Amendment 17
Fifth Amendment 2, 25
Eighth Amendment 18
Fourteenth Amendment 2, 8, 15
Fifteenth Amendment .....

Congressional Record:

86th Congress:

p. 1 6

90th Congress:

p. 3256 21
p. 3260 21
p. 3261 ..... 7, 21
p. 3262 22
p. 7628 ..... 7, 22
p. 7725 22
p. 7726 22

Dutcher, "The Right of Expatriation", 11 Amer. L.R. 447, 474 9
Getty's "The Law of Citizenship in the United States" (Univ. of Chicago Press, 1934), page 160 9
House Report 1229, 70th Congress, 2nd Session 6, 20
Nationality Act of 1940, Sec. 401(j) (8 U.S.C. 801(j)), (Act October 14, 1940, c. 876, Title I, Subchap. IV, sec. 401, 54 Stat. 1168, as amended Sept. 27, 1944, C. 418, Sec. 1, 58 Stat. 746) 2, 6, 15, 19
Nationality Act of 1940, Section 403 (b) (8 U.S.C. 803 (b)) 31
Nationality Act of 1940, Sec. 503 (8 U.S.C. 903) 3
Proclamations Nos. 2425, 2486, 2535; 50 U.S.C.A. Appx. 302) 23

Page

Proclamation No. 2597, October 23, 1943 (50 U.S.C.A. Appx. 302) 22
Revised Statutes 1999 (8 U.S.C. 800) 10

Selective Service Act of 1940:

8 U.S.C. App. 311 ..... 21, 27
8 U.S.C. App. 317 (54 Stat. 897) 21

Senate Report 1075, 70th Congress, 2nd Session 6, 20

Statutes at Large:

Volume 37, p. 356 21
Volume 54, p. 1172 21

Swift, "A System of the Laws of the State of Connecticut," Vol. 1, p. 164, Windham, Conn. 1795-96. 9

United States Code:

Title 8, Sec. 800 ..... 10, 11, 14
Title 8, Sec. 801 ..... 10, 13
Title 8, Sec. 801(c) 12
Title 8, Sec. 801(e) 12
Title 28, 1254(1) 1

Universal Declaration of Human Rights, Article 15(2) (adopted by the General Assembly of the United Nations, Dec. 10, 1948) 25

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 111

DANIEL CASTANEDA GONZALES,
Petitioner,

vs.

H. R. LANDON, District Director of Immigration and Naturalization of District No. 16, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S OPENING BRIEF

Opinions Below

The trial court rendered no written opinion. The opinion of the court below is reported at 215 F. (2d) 955.

Grounds on Which the Jurisdiction of This Court Is Invoked

This court has jurisdiction under 28 USC 1254(1). The judgment of the court below, the United States Court of Appeals for the Ninth Circuit, was entered on September 8,

1954 (R. 38). Time for filing petition for writ of certiorari was extended to and including February 5, 1955. (R. 38) The petition was filed on February 4, 1955 (R. Cover Page). Certiorari was granted on May 31, 1955. (R. 39)

Constitutional and Statutory Provisions Involved

Section 1 of the Fourteenth Amendment to the United States Constitution:

> "All persons . . . born in the United States, and subject to the jurisdiction thereof, are citizens of the United States. . . ."

Fifth Amendment to the United States Constitution:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Section 401(j), Nationality Act of 1940 (8 USC 801(j)), (Act, Oct. 14, 1940, c. 876, Title I, Subchap. IV, § 401, 54 Stat. 1168, as amended Sept. 27, 1944, C. 418, Sec. 1, 58 Stat. 746):

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> "(j) Departing from or remaining outside the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

Questions Presented For Review

1. Whether on its face, and as applied, 8 USC 801(j) is constitutional under the due process clause of the Fifth

Amendment and the citizenship clause of Section 1 of the Fourteenth Amendment.

2. Whether 8 USC 801(j) is to be construed so as to expatriate a native born citizen who had been living since infancy in Mexico and who was still living there when the said section was passed and who registered for military service in Mexico pursuant to Mexican law.

3. Whether respondent carried its burden of proving that petitioner expatriated himself under 8 USC 801(j) by clear, convincing and unequivocal evidence.

Statement of the Case

Petitioner was born in the United States on July 21, 1924 (R. 7). He was taken by his parents to reside in Mexico when he was two years old (Ibid) and resided there with his mother and younger brothers and sisters, his father having died in 1935 (R. 8), until he came to the United States on April 23, 1846 (R. 12).

At the time of the filing of suit in the District Court, petitioner was in the custody of the Immigration and Naturalization Service, being held for deportation to Mexico on the ground that petitioner had lost his United States citizenship under 8 USC 801(j), (R. 1, 13).

The complaint was filed under Section 503 of the Nationality Act of 1940 (8 USC 903) for a declaration that petitioner is a national of the United States (R. 1).

The only evidence at the trial was the testimony of petitioner and the transcription of questions asked of and answers given by petitioner before officers of the Immigration and Naturalization Service (Exhibit A; R. 27).

The testimony of petitioner at the trial produced no evidence to the effect that he had departed from or remained outside the jurisdiction of the United States at any time for the purpose of avoiding training and service

in the land or naval forces of the United States. The only evidence before the court on this question was pursuant to a stipulation (R. 27) between counsel that if officers of the Immigration Service were called as witnesses they would testify that in 1947 (R. 13), 1950 (R. 18) and 1952 (R. 24) certain questions were asked of petitioner and certain answers given by him. Concededly, though confusedly (cf. R. 26), among the questions and answers these officers would have testified to were questions and answers to the effect that petitioner had remained outside the United States from September, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land and naval forces of the United States (R. 19, 20).

Petitioner at the trial denied that he had made such answers to such questions (e.g. R. 20), but the trial court accepted (R. 33) the in absentia testimony of the immigration officers that petitioner had been asked such questions and had given such answers. Based thereon, the trial court held (R. 5) that petitioner had remained outside the United States from September, 1944 until April 23, 1946 for the purposes of evading or avoiding military training and service in the United States, and therefore had lost his citizenship.

Petitioner testified both at the trial (R. 10) and before the immigration officers (R. 11, 19) through an interpreter. At the trial, the first interpreter, a representative of the Immigration Service (R. 9), proved to be unsatisfactory (R. 11) and the court required another one to be procured. (Ibid.).

There is no evidence of any kind that petitioner intended to expatriate himself, or consented thereto or had knowledge of the consequence that one might lose his citizenship by remaining outside the United States for the purpose of evading military service.

ARGUMENT

Summary of Argument

Since the petitioner was born a citizen of the United States, the Government, in order to prove that petitioner lost his nationality, must do so by evidence that is clear, convincing and unequivocal;—evidence leaving no troubling doubts. The evidence adduced by the Government to prove the fulfillment by petitioner of the conditions called for in 8 USC 801(j) did not rise to that high standard of required proof.

If petitioner did remain outside the United States for the purpose of avoiding military service, there is still no loss of citizenship, because 8 USC 201(j) should be interpreted, in order to avoid unconstitutionality, so as not to apply to the facts of this case where petitioner had been taken as an infant to Mexico, lived there all his life, and the law in question was passed while he was still a minor, living with his mother abroad. The statute, being penal in nature, should be strictly construed.

If applicable to the facts of this case, the statute is unconstitutional, because Congress has no power to legislate away rights which are constitutionally endowed, absent a knowing and intelligent waiver, and specifically in regards to taking away citizenship, absent consent of the citizen and absent a knowledge of the consequences of his act or acts.

I

Section 401(j) of the Nationality Act of 1940 (8 USC 801(j)) is unconstitutional

A

Preliminary Statement

Unlike the original subsections of Section 401 which were concerned with the problem of dual nationality and allegiance,[1] Section 401(j) is an out and out punitive statute. Thus in urging the legislation, the Attorney General said (pgs. 2 of S. Rept. 1075 and H. Rept. 1229, 78th Cong. 2d Sess.):

> ". . . Persons who are unwilling to perform their duty to their country and abandon it during its time of need are much *less worthy of citizenship* than are persons who become expatriated on any of the existing grounds." (Italics added.)

---

[1] See Cabinet's Letter of Submittal to the President on the proposed Section 401, as reported in *Dos Reis* v. *Nicolls*, 161 F. 2d 860, 863:

> ". . . None of the various provisions in the Code concerning loss of American nationality . . . is designed to be punitive or to interfere with freedom of action. They are merely intended to deprive persons of American nationality when such persons, by their own acts, or inaction, show that their real attachment is to the foreign country and not to the United States."

And see statement by Congressman Rees, Manager on the part of the House (86 Cong. R. 1):

> ". . . Not only do the nationality laws need clarifying and orderly arrangement in a single code, but substantive changes are necessary in connection with certain rights, with a view to preventing persons *who have no real attachment* to the United States from enjoying the high privilege of American nationality." (Italics added).

And Congressman Dickstein said (90 Cong. Rec. 3261):

> "Any man, any American, who leaves this country for the purpose of not serving his country in time of war is a *traitor,* in my judgment." (Italics added)

While Chairman Russell said (90 Cong. Rec. 7628):

> "Certainly those who, having enjoyed the advantages of living in the United States, were unwilling to serve their country to subject themselves to the Selective Service Act, should be *penalized* in some manner." (Italics added.)

But where does Congress derive power to punish "unworthy" persons[2] by de-citizenizing them in the face of the Constitutional grant of citizenship? Unlike the power of Congress, pursuant to Article I, Section 8, Cl. 4, to condition the grant of naturalization (Cf. *Lapides* v. *Clark,* 176 F. 2d 619; cert. den. 338 U. S. 860; reh. den. 338 U. S. 888), Congress has no such power, absent consent, to take away that which the Constitution grants.

Petitioner is a citizen of the United States, not by grace of Congress, nor by its Act. He is a citizen by virtue of the United States Constitution (Amendment Fourteen). A constitutional right which the *Constitution* and not *Congress,* grants him, may not be taken away from him involuntarily. Article VI, Section 2 of the Constitution provides that "(t)his Constitution and the laws of the United States made in pursuance thereof . . . (are) the supreme law of the land." It can scarcely be said that a law which takes *away* citizenship which has been *granted* by the Constitution is a law made *in pursuance* of that Constitution. On the contrary, such an act is in direct derogation thereof.

---

[2] Or to thus punish treason in the light of Art. III, Sec. 3 of the Constitution?

In *Dos Reis* v. *Nicolls,* 161 F. 2d 860 (CCA 1 1947) the court discusses the constitutional problem here involved (161 F. 2d at 862) and expresses doubt as to the validity of such legislation, but does not reach the question because it construed Section 401(c) in such a way as to avoid it. However, that court did recognize that expatriation cannot be effected unless the act performed or condition entered into is performed voluntarily "with notice of the consequences." And that court quoted from this court's decision in *Mackenzie* v. *Hare,* 239 U. S. 299,311, that

> "a change in citizenship cannot be arbitrarily imposed, that is imposed without the concurrence of the citizen."

Holding directly that *Congress* has no authority to destroy, diminish, or dilute the *United States citizenship conferred by the Fourteenth Amendment to the Constitution* of the United States, is *United States* v. *Wong Kim Ark,* 169 U. S. 649. In that case this Court declared (at p. 703):

> " . . . *The power of naturalization, vested in Congress* by the Constitution, *is a power to confer citizenship,* not a power to take it away." (Italics added).

B

The Right of Expatriation Is Not to Be Equated with the Penalty of Expatriation

It is clear that a United States citizen may not renounce his citizenship without the consent of the Sovereign.

In *Shanks* v. *Dupont,* 3 Pet. (U. S.) 242,246, this court said:

> "The general doctrine is, that no persons can, by any act of their own, *without the consent of the government,* put off their allegiance and become aliens." (Italics added)

Accord: *Murray* v. *The Schooner Charming Betsy*, 2 Cranch (U. S.) 64, 120.

This is consistent with what the text writers have said on the subject.

In Getty's *The Law of Citizenship in the United States*, (Univ. of Chicago Press, 1934) at page 160, this explanation is made:

> ". . . The right of an individual to terminate his native allegiance without the consent of his native country has been the subject of prolonged controversy and disagreement among the states of the world. International law recognizes that each state decides for itself whether or not expatriation is permissible. At present there seems to be no agreement as to the existence of a 'right of expatriation.' Some states have indicated a recognization of the doctrine of voluntary expatriation under certain conditions, as specified in bilateral treaties. Other states recognize the right unconditionally, while still others do not permit the expatriation of their citizens except by special consent . . ."

Dutcher in his article, *The Right of Expatriation*, 11 Amer. L. R. 447, 474, exhaustively reviews the subject and says:

> "The whole body of Federal law . . . announces with greater or less distinctness that a citizen of the United States cannot absolve himself from his allegiance thereto without some law of the United States permitting him so to do. Nor does the act of 1868 change the rule."

Swift, in *A System of the Laws of the State of Connecticut* (Windham, Conn., 1795-96, Vol. 1, P. 164), says:

> "Natural allegiance is the perpetual obligation to government binding on all mankind. It is a duty which

> they owe and which they can never renounce and disclaim, *without the consent and concurrence of the supreme power of the state.*" (Italics added.)

Blackstone put it this way:

> "Allegiance is the tie, or *ligamen,* which binds the subject to the King, in return for that protection which the King affords the subject. . . .
>
> ". . . (T)his natural *allegiance* . . . *cannot be devested without the concurrent act of that prince to whom it was first due.*" (Second italics added) (1 Blackstone, Commentaries, 367 et seq.)

Hence, it became necessary for Congress in 1868 to pass legislation giving such consent. And it did so in eloquent language. (R. S. 1999; 8 USC (1946 Ed) 800). But even today, (8 USC 1483) Congress has withheld consent to expatriation in certain cases. (Cf. *In re Grant,* 289 F. 814 (DC SD Cal. 1923; *United States* v. *Kuwabara,* 56 F. Supp. 716 (DC ND Cal. 1944)).

One of the most recent examples of the necessity for governmental consent before a citizen can throw off the mantle of citizenship occurred also during World War II when Congress enacted 8 USC 801(i) (c. 368, Sec. 1, 58 Stat. 677) with reference to the American-born Japanese who had been evacuated from the Pacific Coast and were held in camps by the United States Government. An account of this is set out in *Acheson* v. *Murakami,* 176 F. 2d 953, 962 (CCA 9, 1949) (Finding 19).

Also demonstrating the necessity for the consent of the sovereign is *Kawakita* v. *United States,* 343 U. S. 717 where, in defense to a charge of treason, the defendant contended that he had exercised his "natural and inherent right" to expatriate. This contention was rejected.

If, then, a citizen cannot expatriate himself without the consent of the sovereign, especally because of the constitutional root of native born American citizenship, the Sovereign cannot yank off the mantle from the citizen without his consent, voluntarily entered into "with notice of the consequences." United States citizenship is a two-way highway, not a one-way street. Neither the Government may impose its loss nor may the citizen shed it without the consent of the other. This is not new doctrine. As seen, it was recognized as early as Blackstone's time. And see Chief Justice Parsons in *Ainslee* v. *Martin*, 9 Mass. 454 (1813):

> "Protection and allegiance are reciprocal. The sovereign cannot refuse his protection to any subject, *nor discharge him from his allegiance against his consent:* and he will remain a subject, unless disfranchised as a punishment for some crime." (Italics added.)

It is, of course, accepted law that a person may give up, or "waive" constitutional rights. We concede that the right of citizenship granted and guaranteed by the Fourteenth Amendment would be among those constitutional rights which could be waived.[3] Else, 8 USC 800 would be meaningless. But it is equally accepted law that such waivers are not to be lightly implied and that before a waiver will be decreed, there must be the exercise of a free and intelligent choice [4] of at least the magnitude that this Court requires, for example, for a waiver of the right to counsel,[5] or

[3] "Expatriation is the voluntary *renunciation or abandonment* of nationality and allegiance." *Perkins* v. *Elg*, 307 U.S. 325, 334. (Italics added).

[4] Cf. the same rule even when one is *applying* for citizenship. *Moser* v. *United States*, 341 U.S. 41.

[5] *Johnson* v. *Zerbst*, 304 U.S. 459, 464; *Glasser* v. *United States*, 315 U.S. 60, 70; *Gibbs* v. *Burke*, 337 U.S. 773, 780; *Ureges* v. *Pa.*, 335 U.S. 437, 441.

the right to a jury trial,[6] or the right to freedom from unreasonable search and seizure,[7] or the privilege against self-incrimination.[8] Were it otherwise, Congress would then be taking away *without the consent of the citizen,* a right guaranteed him by the Constitution. Congress can no more do this in regard to citizenship than it can say that a man waives the right to counsel because he voluntarily pleads guilty when he does not know of the right to counsel in the first place (*Rice* v. *Olsen,* 324 U. S. 786).

In other words, because Congress had the right to and did recognize the right of a citizen to give up his citizenship when he *wanted* so to do, i. e. recognized the "right of expatriation", it had no power to twist that right into a liability and *impose* expatriation where the citizen did not want to give up his birthright.

C

Congress Has Here Exceeded Its Power

Similar legislation (8 USC 801(c) and (e)) to that involved here was declared unconstitutional by the United States District Court for the District of Hawaii in *Okimura* v. *Acheson,* 99 F. Supp. 587 and *Murata* v. *Acheson,* 99 F. Supp. 591. Direct appeals were taken to this court by the Government. This Court did not pass on the issue but remanded the cases to the District Court for specific findings as to the circumstances attending the military service and voting involved (342 U. S. 899 and 900). On remand, the court made the required findings and still held the sections

---

[6] *Patton* v. *United States,* 281 U.S. 276, 312: *Hodges* v. *Easton,* 106 U.S. 408; *Aetna Ins. Co.* v. *Kennedy,* 301 U.S. 389, 393.

[7] *Johnson* v. *United States,* 333 U.S. 10, 13; *Amos* v. *United States,* 255 U.S. 313; *United States* v. *Di Re,* 332 U.S. 581.

[8] *Smith* v. *United States,* 337 U.S. 137, 150; *Quinn* v. *United States,* 349 U.S. 155.

unconstitutional (*Okimura* v. *Acheson*, 111 F. Sup. 303; *Murata* v. *Acheson*, 111 F. Supp. 306). That court adhered to these decisions in six later cases.[9] The Government pursued appeals in none of these cases. In the light of this fact, the *Okimura* and *Murata* cases take on additional stature.

In the second Okimura case, (111 F. Supp. 393) the court pointed out that it adhered to the rationale presented in the first case (99 F. Supp. 587). In that first case the court had said (99 F. Supp. at 589, 590):

> "May Congress divest a native born citizen of his birthright?
>
> ". . .
>
> "The point under discussion does not involve the unquestioned power of Congress to enact naturalization laws and to condition the retention of the status of citizenship so acquired. . . .
>
> ". . .
>
> "Too, it may be granted that a native citizen may lose that status by naturalization in a foreign country if the American national complies with the formalities with a specific, as distinguished from constructive, intention to cast off his United States citizenship.
>
> "Our concern is, rather, where in the Constitution is to be found any grant of power—specific or reasonably implied—by which Congress is authorized to divest an American born citizen of his nationality because, having also Japanese nationality, he served in the Japanese Army or voted in an election in Japan?
>
> "It is the view of this Court that while the Constitution gives the Congress plenary power over citizenship

---

[9] *Terada* v. *Dulles*, 121 F. Supp. 6; *Uesu* v. *Dulles*, No. 1251; *Kikkawa* v. *Dulles*, No. 1256; *Hisamoto* v. *Dulles*, No. 1318; *Tamada* v. *Dulles*, 1263 and *Igarashi* v. *Dulles*, No. 1240 (the latter holding 8 USC 801(d) also invalid).

by *naturalization*, it leaves the Congress no power whatsoever to interfere with American citizenship by *birth*.

"The leading case on this subject is United States v. Wong Kim Ark, 1898, 169 U. S. 649, 18 S. Ct. 456, 42 L. Ed. 890. While some of its teachings seem to have been occasionally forgotten or whittled down in recent years, it has never been overruled.

". . .

"Section 800 of Title 8, United States Code Annotated, deals eloquently with the 'right' of expatriation, yet Section 801, applicable alike to native and naturalized citizens, attempts to spell out some ways in which that 'right' may become a liability.

"Congress may not thus declare that by performing such and such an act, in or out of the United States, a citizen will become expatriated. Congress has been given control over only one means of *creating* United States citizenship, namely by naturalization. It has the power to create and to condition that grant of citizenship; but is wholly devoid of any power to destroy citizenship by birth." [10]

We submit that this reasoning represents the correct law. We have previously called attention to the *Wong Kim Ark* case where this Court said (169 U. S. at 703):

"The 14th Amendment, while it leaves the power of Congress where it was before, in Congress, to regu-

[10] By footnote 1, pg. 590, the court made this significant statement:

"This Court is aware that there have been authoritative intimations to the contrary. See Mackenzie v. Hare, 239 U.S. 299, 311-312, 36 S. Ct. 106, 60 L. Ed. 297; Perkins v. Elg, 307 U.S. 325, 329, 59 S. Ct. 884, 83 L.Ed. 1320; and Kawakita v. United States, 9 Cir., 1951, 190 F. 2d 506. But only in the Mackenzie case was the precise Constitutional question here involved squarely presented, and there under vastly different facts."

late naturalization, has conferred no authority upon Congress to restrict the effect of birth, declared by the Constitution to constitute a sufficient and complete right of citizenship."

Moreover, a comparison between the language of the Constitution and the statute in question immediately demonstrates the patent invalidity of 8 USC 801(j). Thus:

14th Amendment, U. S. Constitution	*8 U. S. C. 801*
"All persons born or naturalized in the United States . . . are citizens of the United States . . ."	"A person who is a national of the United States shall lose his nationality by: . . ."

Nor does the declaration of Congress in 8 U. S. C. 800 change the situation. Regardless of what may be the rule where an American citizen actually *renounces* his citizenship, there is no basis for saying that Congress has the right to deprive him of his citizenship by the doing of acts other than actual renunciation, simply because Congress does not like him. The Constitution gives Congress no such right; that body cannot, by a declaration, clothe itself with such power.

In its brief in opposition to the petition, the government argues (Pg. 9) that the only check on Congress' power to decree involuntary expatriation is the due process clause of the Fifth Amendment. As will be seen, we dispute this point. But even if so, Congress has overstepped its bounds here. If going or remaining abroad to evade service gives ground to impose expatriation, why does not draft evasion of a person who remains in the United States furnish the same ground? And, logically speaking, why does not violation of any war-time law, or any law of the United

States, render the person "unworthy of citizenship" and, hence, subject to involuntary expatriation? The very posing of these questions, we submit, demonstrates the unreasonableness of the section here in question.

The suggestion that the only check on Congress' power to take away Constitutional rights is the Due Process clause, is novel and sweeping doctrine. Following such reasoning, it would logically ensue that, subject only to the Due Process clause of the Fifth Amendment, Congress has the power to take away or nullify any right or status which the Constitution gives. Some examples by way of rhetorical questions will demonstrate the fallacy of such a position:

1. Article I, Section 1, says that Congress shall consist of a Senate and a House of Representatives. May Congress decree that hereafter Congress shall consist of only a Senate?

2. Article I, Section 2, subsection 1, provides that members of the House of Representatives shall be chosen every second year. May Congress provide that hereafter members of the House shall be elected every third year?

3. Article I, Section 2, subsection 4, provides that where there is a vacancy in the House of Representatives from any state, the executive of that state shall fill the vacancy. May Congress provide that in such an instance the executive of that state shall not have the right but that Congress itself shall fill the vacancy?

4. Article I, Section 3, subsection 6, provides that the Senate shall have the sole power to try all impeachments. May Congress provide that the power to try impeachments shall henceforth be given to the House?

5. Article I, Section 3, subsection 7, provides that the judgment in impeachment shall extend only to removal from office and disqualification. May Congress enact that a judgment of impeachment may provide for sending the officer to jail?

6. Article I, Section 6, subsection 1, provides that a Senator or Representative for a speech or debate in either house shall not be questioned in any other place. May Congress provide that a Representative could be called to answer for a speech in the House before a Federal Grand Jury?

7. Article II, Section 1, subsection 1, provides that the President shall hold office for four years. May Congress provide that henceforth he shall only hold office for three years?

8. Article II, Section 2, Clause 1, provides, inter alia, that the President shall be the Commander-in-Chief of the Army and Navy, and that he shall have the power to grant pardons save in cases of impeachment. May Congress provide that he shall lose his command or his power to pardon if he engages in acts of which Congress disapproves?

9. Article III, Section 1, provides that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may establish. May Congress provide that the Supreme Court shall no longer have judicial power if it acts in a manner displeasing to Congress?

10. Article III, Section 3, Clause 1, provides that Congress may admit new states to the union. May Congress provide that a state once admitted into the union can be ousted therefrom?

11. Article VI, Section 3, provides that no religious test shall be required as a qualification for an office of public trust. May Congress provide that such a qualification be required?

12. The Third Amendment provides that no soldier shall, in time of peace, be quartered in any house without the consent of the owner. May Congress provide that, in time of peace, soldiers may be quartered in a house without the owner's consent?

13. The XVIIth Amendment provides that each state shall have two Senators. May Congress provide that a particular bad acting state shall have one or no Senators?

Further examples could, of course, be cited. The point is that citizenship is a specific right which the Constitution and not Congress gives. How, then, can Congress undo what the Constitution does?

Moreover, if Congress can strip away citizenship from persons constitutionally endowed with that status, why cannot it take away lesser rights which go to make up that bundle which we call American Citizenship, such as: the right to trial by jury, to be represented by counsel, to freedom of spech, etc. A familiar maxim is that the greater includes the lesser. Therefore, if Congress can take away the whole of citizenship, it should logically follow that it can take away any part thereof.[11] We believe Congress has no power in either instance. Cf. *Dawson's Lessee* v. *Godfrey,* 4 Cranch (U. S.) 321, 323: "(A) man can never put off his allegiance, or be deprived of the benefits of it but for a crime."

Both on its face and from its history, Congress, by the legislation at bar, is punishing in this extreme way, for violation of law. In so doing Congress has acted arbitrarily as well as beyond its authority. We also submit that in trying to exercise such power, looking as it does, towards eventual banishment or exile, here against a person for violating the law, Congress has imposed cruel and unusual punishment contrary to the Eighth Amendment. (Cf. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 730; and see Frankfurter, concurring, in *American Communications Association* v. *Douds,* 339 U. S. 382, 419.)

---

[11] The fact that these rights may also belong to aliens does not detract from the point. They certainly belong to citizens. See *Galvan* v. *Press,* 347 U.S. 522, for an example of where aliens have, if anything, less rights than citizens.

II

ction 401(j) of the Nationality Act of 1940 as Amended, Should Not Be Construed to Impose Expatriation under the Facts of This Case

The facts of this case must ever be borne in mind. Petiner was taken to Mexico when he was less than two years l (R. 9). He lived there with his family until he was 21, ien he came back to the United States. When he was ten ars old, petitioner's father died (R. 13) and petitioner as forced to quit school and go to work to support his mily (*Ibid*). Petitioner was the eldest child of a family six children (R. 12). The record in this case is that petiner was not a national or citizen of Mexico (R. 1, 3). e registered for military service in Mexico (R. 16), a coun- with which we were allied during the War. (See Agreent Between the United States and Mexico relating to ilitary Service; 57 Stat. 973, 976).

Section 401(j) of the 1940 Nationality Act was passed on ptember 27, 1944 (58 Stat. 746) when plaintiff was still minor and still working to support his family.

The statute being penal [12] in nature and effecting a forfiture, it is to be strictly construed. *Guessefeldt* v. *McGrath*, 342 U. S. 308, 319; *Federal Communications Commission* v. *American Broadcasting Company*, 347 U. S. 284, 296). Especially is this so where otherwise a grave constitutional issue would be raised. (*Guessefeldt* v. *McGrath*, *supra*). It goes without saying, that this should be the se in an expatriation statute which seeks to strip away "precious (a) right" (*Schneiderman* v. *United States*, 0 U. S. 118, 125) as United States citizenship. In such case "the facts and the law should be construed as far

[12] Cf. Statement by the trial court, (R. 21): "The purpose . . . was penalize those who would not participate in the war effort."

as is reasonably possible in favor of the citizen" (*Ibid,* at page 122).

The statute was aimed at an entirely different factual problem than the one presented here. It was aimed at those persons who, during World War II, *left* the United States for the purpose of evading military service and, of course, thereafter remained away for that purpose. The section was enacted at the request of the Attorney General in a letter dated February 16, 1944 addressed to Senator Russell, Chairman of the Senate Committee on Immigration (S. Rept. 1075 and H. Rept. 1229, 78th Cong., 2d Sess.). In that letter, the Attorney General said (pgs. 2, above cited reports):

> "The files of this Department disclose that at the present time there are many citizens of the United States who have left this country for the purpose of escaping service in the armed forces. While such persons are liable to prosecution for violation of the Selective Service and Training Act of 1940, if and when they return to this country, it would seem proper that in addition they should lose their United States citizenship. . . .
>
> "Accordingly, I recommend the enactment of legislation which would provide (for expatriation of citizens and exclusion of aliens."

The legislation, therefore, was aimed at penalizing those citizens who were leaving the country for the interdicted purpose and not at those, who, like petitioner, had been taken by their parents for reasons wholly unconnected with military service and who were residing in an ally country and in which country they were performing their military obligation.[13]

---

[13] Petitioner registered for Mexican military service in Mexico in 1942 (R. 16).

When Congress passed the 1940 Nationality Act in which Section 401, giving various grounds for expatriation, was included, it repealed (54 Stat. 1172; 8 USC 904) previous legislation enacted during World War I (37 Stat. 356) providing for the expatriation of persons who went beyond the limits of the United States with intent to avoid the draft. Congress, thus, was content to have the sole sanction against draft evasion of the 1940 Selective Service Act, which it passed the same year (8 USC Appx. 317, 54 Stat. 897), rest with the penal provisions of the Selective Service Act (8 USC Appx. 311). If, from no other source, Congress at least knew from the Attorney General's letter above referred to, that citizens had left and were *leaving* the United States for the purposes of draft evasion and so they drafted Section 401(j) to meet *that practice.*

Support for this thesis is seen from the debate on the bill (H. R. 4257, 78th Con.) in both houses of Congress. Thus, Congressman Sabbath said (90 Cong. Rec. 3256):

> "It aims to preclude from reentry into the United States of a large number of men who have *left this country for the purpose* of avoiding service in the United States armed services." (Italics added.)

Congressman Fish stated (90 Cong. Rec. 3260):

> "This is aimed at the draft dodgers who *left* America to go to some foreign nation *to keep out of the draft.*" (Italics added.)

Congressman Dickstein, who introduced the bill, said (90 Cong. Rec. 3261):

> "I would classify this piece of legislation as a bill to denaturalize and denationalize all draft dodgers who *left this country knowing* that there was a possibility *that they might be drafted in this war* and that they

might have to serve in the armed forces or the marines and in an effort to get out of such service." (Italics added.)

And, again (90 Cong. Rec. 7725, 7726):

"The purpose of the bill is to keep out of the country certain people who evaded war service and *left this country after Pearl Harbor,* especially most of them having left after the declaration by the President and the Congress of a state of war." (Italics added.)

Congressman Mason said (90 Cong. Rec. 3262):

"This is not a Member of Congress who does not agree completely with the purpose of the bill to denaturalize, I would put it, or expatriate any citizen who dodges the draft by *skipping out of the country.*" (Italics added)

On the Senate side, Senator Russell, Chairman of the Senate Committee on Immigration, said (90 Cong. Rec. 7628):

"This bill provides that any person who is a national of the United States, or an American citizen, and who *in time of national stress departed* from the United States to another country to avoid serving his country, shall be deprived of his nationality." (Italics added.)

That Congress did not intend the legislation to cover a person such as petitioner is also seen from the fact that none of the Presidential Proclamations setting forth the times at which registration was required called for an American citizen living abroad to return to the United States. Indeed, it was not until Proclamation No. 2597,

October 23, 1943 (50 USCA (1946 Ed.) Appx. 302, note) that there was any requirement for an American living abroad to even register for military service. And that proclamation made provision for the registration to be effected abroad with no requirement for returning to the United States. The previous proclamations (Nos. 2425, 2486, 2535; 50 USCA (1946 Ed.) Appx. 302, note) simply provided for registration within a certain time period after those persons returned to the United States, but there was no requirement that they return within a certain period or at all.

Accordingly, especially in view of the Attorney General's letter and the Congressional debate, it is seen that the section should not, and was not intended to, be interpreted to cover the case now before the court.

Further support for this argument is also seen from the January 22, 1943 Agreement Between the United States and Mexico Respecting Military Service (57 Stat. 973-977). In that Agreement, entered into between the two countries pursuant to "the mutual desire of our respective countries to unite their efforts as members of the United Nations in prosecuting the war and achieving victory" (57 Stat. at 977), each country agreed that (Para. I; 57 Stat. at 975) nationals of either country resident within the territory of the other may be registered and inducted into the armed forces of their residence on the same conditions as nationals thereof. It was also agreed (Para. IX; 57 Stat. at 976) that:

> "Nationals of each country who have been registered for or inducted into the Army of the other country in accordance with the military service laws of the latter and who have not declared their intention to acquire the citizenship of the country in which they reside shall upon being designated by the country of which they are nationals and with their consent be released for mili-

tary service in its forces provided that this has no prejudicial effect on the common war effort. . . ."

In other words, we agreed to, and recognized, the fact that United States nationals living in Mexico could and would be registered for military service in that country in accordance with its laws and that this practice was in accordance with our desires to prosecute the war and achieve victory.

It is not necessary to decide whether Section 401(j), passed in 1944, supersedes and takes precedence over the 1943 agreement between the two countries (cf. *Chae Chan Ping* v. *United States*, 130 U. S. 581) because, if at all possible the two should be construed so as to give effect to both (*Lem Moon Sing* v. *United States*, 158 U. S. 538) without doing violence to either.

Such mutually effectuating construction is possible here, especially when a contrary construction would raise grave constitutional questions and would attribute to Congress an unnecessary inconsistency.

Congress must be deemed to have known, when it passed Section 401(j), of the agreement between this country and Mexico. It would be attributing to Congress a purpose not warranted by the evil at which the Attorney General's letter was aimed, to visit the extreme penalty of expatriation upon persons, such as petitioner, who were living abroad and performing their military duty there in an ally country.

Petitioner registered under the Mexican military service laws in 1942 (R. 16). There is no showing in the record here that petitioner had declared his intention of acquiring citizenship in Mexico, or that the United States requested of Mexico, as provided by Paragraph IX of the Agreement, that petitioner be released for military service in our forces. Accordingly Section 401(j) should not be construed to encompass petitioner, who is an obvious beneficiary, if you

will, or subject of the mutual agreement between the two countries.

Moreover, it will be noticed that Paragraph IX of the Agreement provides for the release of a national of one country resident in the other who has registered for or been inducted into the Army of the other country only with the *consent* of the registrant or inductee. In other words, Congress knew, when it passed 401(j) of the right, so to speak, of a United States National in Mexico, who, like petitioner, had registered for military service in Mexico, to refuse to come back for military service in the United States, or, if you will, to remain away from the United States, under these special circumstances, "for the purpose of evading or avoiding training and service in the land or naval forces of the United States." The Agreement was entered into, obviously, to avoid confusion and to provide for orderly treatment of the military service obligations of nationals of the two countries residing in the other.

With such knowledge before Congress, Section 401(j) should not be construed to include the facts of this case.

As noted, even Respondents agree (Br. in Opp. to Cert. pg. 9) that if Congress does have the power to impose involuntary expatriation, that power cannot be exercised arbitrarily and is subject to the Due Process Clause of the Fifth Amendment.[14] We submit that to construe the statute to compel expatriation under the circumstances of this case would be to arbitrarily deprive petitioner of his nationality.

---

[14] Cf. Article 15(2) of the Universal Declaration of Human Rights (adopted by the General Assembly of the United Nations, Dec. 10, 1948): "No one shall be arbitrarily deprived of his nationality . . ."

III

The Government Did Not Produce Evidence Meeting Standard of Proof Required

The Government concedes (Br. in Opposition to Pet. 1, that since petitioner was born a citizen of the United Stat the burden is on the Government to prove expatriation evidence that is clear, unequivocal and convincing. But Government's burden is more than this. The famil cases [15] make it clear that there can be no ambiguity, tha mere preponderance of evidence is not sufficient, and that evidence must be of such solidity as to leave "no troubl doubt."

Moreover, since it is the Government's burden to est lish the expatriation, this burden, and by the same deg of proof, must be carried as to all elements of the cas This means that the Government must thus prove, by t high standard of proof, not only that petitioner remaine outside the United States for the purpose interdicted by statute but also that he did so voluntarily. This, becau there can be no expatriation unless the conduct is vol tary.[18]

We submit that the Government's proof fails as to b these issues.

---

[15] E.g. *Perkins* v. *Elg*, 307 U.S. 325, 337; *Schneiderman* v. *Un States*, 320 U.S. 118, 125; *Baumgartner* v. *United States*, 332 U.S. 670.

[16] *Augello* v. *Dulles*, 220 F. 2d 344, 345 (CA 2 1955); *Lehmann Acheson*, 206 F. 2d 596, 598 (CA 3 1953); *Schioler* v. *Secretary of St* 175 F. 2d 402, 403 (CA 7 1949).

[17] There can be no contention that petitioner departed the Un States for the purpose prohibited by the statute.

[18] *Perkins* v. *Elg*, 307 U.S. 325; *Dos Reis* v. *Nicolls*, 161 F. 2d (CCA 1 1947); *Fukumoto* v. *Dulles*, 216 F. 2d 553, (CA 9 1954); ca cited *supra*, f.n. 16. See also *Mandoli* v. *Acheson*, 344 U.S. 133.

First, as to the proof that petitioner remained outside the United States from September 27, 1944 until April 23, 1946 (R. 3; affirmative defense) for the purpose of evading or avoiding service in the land or naval forces of the United States.

The proof on this issue consists solely of testimony by the immigration officers [19] that on previous occasions petitioner was asked and he answered affirmatively certain questions, including leading questions such as (R. 19, 20): "Do you admit that you remained outside the jurisdiction of the United States from September, 1944 until April 23, 1946 for the purpose of evading or avoiding training and service in the land and naval forces of the United States?" [20] This kind of evidence is the only evidence in the case. Of course, the mere fact that petitioner may have *said* on other occasions that he remained outside the United States for the interdicted purpose, does not make or establish that to be *the fact*. It is only by inference from those previous statements that the fact can be concluded. In other words, the Government's entire case rests upon *inference*. We submit that this is indeed a slender reed upon which to rest in order to "reduce (petitioner) to the status of alien from that of citizen", (*Baumgartner* v. *United States*, 332 U. S. 665, 670) rather than charge him with crime for violation of the Selective Service Act (50 USC Appx. 311).

---

[19] Where petitioner was not represented by counsel. (Exh. A; R. 27).

[20] The record on this is confused and not clear. For example, the question just put is supposed to have been posed by the immigration officers in 1947 (R. 19). Compare this with a question that is supposed to have been asked of him in 1952 (R. 24) and his answer thereto (R. 25, 26):

"Q. At your hearing before the Board of Special Inquiry at El Paso, Texas in 1947 and 1950, did you admit that you remained in Mexico during the war for the purpose of evading or avoiding training or service in the army?

"A. No."

Moreover, the circumstances under which these statements were made must be considered. Thus, they were made by a young man who had lived all his life in Mexico, had to quit school at the age of 10 to go to work (R. 13) before officers who had omnipotent authority over him, and through an interpreter (R. 19).[21] In cases involving almost identical factual situations, likewise involving boys born here who were taken to Mexico at an early age, lived there all their lives, came to the United States, made statements before immigration officials and denied them at the trial, other courts have previously noted the unrealistic, excitable circumstances under which such statements are obtained and the desires of persons such as petitioner to please the officers examining them.[22] In the *Nieto* case, the court said (108 F. Supp. at 154):

> "I am not committed to the idea that an admission, statement, or confession made before such Boards are infallible, or indeed, that they always represent the truth. Especially do I doubt their force when the parties are poor, illiterate Mexicans on the one hand and experienced Government officers on the other hand; the one unrepresented and untrained; the other well represented and well trained.
>
> ". . . I have had enough experience with interpreters in the courts to know that often, on crucial points, there is a disagreement between interpreters as to what a witness said, or as to the meaning of the answers he gave. I have also noted that seldom are answers given by a Mexican peon in the detailed and

---

[21] We have already noted that at least one interpreter used in these proceedings was incompetent. (R. 11).

[22] *Ponce* v. *McGrath*, 91 F. Supp. 23, 24 (DC SD Cal. 1950); *Nieto* v. *McGrath*, 108 F. Supp. 150, 154 (DC SD Tex. 1951); *Martinez* v. *McGrath*, 108 F. Supp. 155, 156 (DC SD Tex. 1952).

apparently voluntary manner in which plaintiff is reported to have answered. Uniformly the questions must be leading. Even then, generally there is considerable jabbering back and forth between the interpreter and the witness, to get a simple answer to a simple question."

In the *Ponce* case, the court said (91 F. Supp. at 24):

"The court is left to draw on its experience and general understanding, and perhaps intuition, in dealing with persons of humble birth reared in environments lacking educational and social advantages, to determine the emotional reactions and probable truth of answers made by such inexperienced persons of immature age when suddenly thrust into a situation which causes them great apprehension in ignorance of the purpose and possible outcome of testimony which they may give in answer to interrogations which may be strange to them.

"Frequently have I learned from irrefutable proof submitted at a later time, that answers made under intense excitement and fear [23] and in an apparent desire to meet agreement and satisfy the questioner and have the matter over with, were utterly false; the falsity of which later was fully realized by the answering person but unexplainable by him when confronted with some of his answers.

"The plaintiff could not have understood the meaning of many of the words used in the hearing, many of which he probably had never heard before, either in Mexican or in English. He had no counsel and no money with which to have employed one had he

[23] Cf. petitioner's testimony here: "They scared me." (R. 14).

known the need for counsel, nor had he a friend present during most of the hearing.

"In handling numerous Chinese immigration cases, I have learned that quite a few Immigration Officers are tough, rough, and designing in their methods of examination, arising, no doubt, from many cases in which they have been fraudulently imposed upon, so that any case which causes the least suspicion in any one of their immediate group, is processed in a manner calculated to win a complete victory over the suspect in the record of testimony procured."

Petitioner does not suggest that the record in this case supports a charge of overreaching by the Immigration officers.[24] The point is, however, that in this type of case, where the Government's evidence must be "indeed overwhelming" (*Meyer* v. *United States*, 141 F. 2d 827 (CCA 5 1944), the evidence relied upon by the Government to prove that petitioner remained away from the United States for the interdicted purpose is simply not sufficient to meet the required standard.

True, the cases just discussed are District Court cases. But the rationale of their reasoning cannot be gainsaid.

Next, as to the Government's proof that, if petitioner did remain away for the interdicted purpose, he did so voluntarily.

On this issue, the Government presented no proof. Indeed, there is evidence just the other way. The very evidence relied upon by the Government gives reason to believe that petitioner remained in Mexico by reason of parental compulsion (R. 19, 26). This would certainly be sufficient to show involuntary action up to July 21, 1945,

---

[24] To the same effect, the court's statement in the *Ponce* case. (91 F. Supp. at 25).

when petitioner came of age. Nine months after he came of age, petitioner came to the United States. That is not an unreasonable length of time for a person to pull up roots, leave his mother and brothers and sisters and come to establish a new life in a different country.[25] It is immaterial whether this fact is sufficient proof *to establish* that petitioner's remaining away was *involuntary*. The point is that, absent positive proof by the Government in this type of case, it casts sufficient doubt on the Government's case to establish that the remaining away for the interdicted purpose was voluntary. Absent such solidity of proof, there can be no expatriation.

Conclusion

The judgment of the court below should be reversed and petitioner declared to be a national and citizen of the United States.

Respectfully submitted,

DAVID C. MARCUS,
FRED OKRAND,
Attorneys for Petitioner.

RALPH ESTRADA,
A. L. WIRIN,
Of Counsel.

---

[25] Particularly is this so because the only period of time during which Section 401(j) could apply here is between July 21, 1945, the day petitioner became 21, and April 23, 1946, the day he came to the United States. By virtue of Section 403(b) of the 1940 Nationality Act (8 USC 803(b)) petitioner could not expatriate himself under Section 401(j) until he became 21. (Cf. *McGrath* v. *Abo*, 186 F. 2d 766 (CA 9 1951)). It then becomes a neat question of proof as to how much remaining outside the United States is necessary before Section 401(j) can come into play.